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NOTES

IS A FRANCHISE PROPERTY?

In 1884, in New York City, six gas companies operating under franchises obtained without charge, lawfully combined. In estimating the amount contributed by each, its franchise was considered, the combined value of all the franchises amounting to $7,781,000, and upon this new stock was issued. A statute, subsequently passed, provided that no gas company of New York City should charge said city more than 75 cents per 1000 feet; that the pressure of such gas should be not less than 1 in. nor more than 2½ in.; and that any corporation violating this Act should forfeit $1000 for each offense.

In considering the constitutionality of this Act in *Wilcox* v. *Consolidated Gas Co., decided January* 4, 1909, the United

States Supreme Court held that the penalties were so excessive that the gas companies were prevented from testing the validity of the Act for fear that if the decision should be adverse to them, their property would be entirely swept away by the penalties, and that the Act to this extent was unconstitutional as not giving equal protection of the laws;[1] and that the provision as to maintaining a certain pressure, which could not be done without renewing to a large extent the equipment of the gas companies and which would not allow an adequate return on the property at the rate specified, was unconstitutional as taking property without due process. However, as these two provisions were separable from the rest, and as it could be plainly seen that the Legislature would wish the remainder of the Act passed even without these unconstitutional provisions, it was declared constitutional to that extent.[2]

But by far the most important question considered was whether a company which has obtained a franchise without cost, may demand a return on that franchise as part of its property. As an original proposition, the lower court denied that a franchise is property;[3] but the Supreme Court says that "it cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation."

As to the real nature of a franchise there are different opinions. One high authority classes it as a species of intangible property.[4] A modern case holds that the right of franchise, when purchased, "constitutes property within the usual and common significance of that word."[5] As paying for the franchise could make no difference in its character after it was gained, this fact would seem to be immaterial in considering whether or not it is property. It has been held that a franchise is merely a characteristic of the corporeal property which is being used under the franchise; that the value of the property is increased by the franchise, and that a return should be had on this increased value.[6] Somewhat the same idea is expressed by a text writer to the effect that "franchises clearly have a

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[1] *Ex Parte* Young, 209 U. S. 123 (1908).

[2] See *Berea College* v. *Kentucky*, 211 U. S. 45 (1908), where the Act, as here, was considered divisible; and *Adair* v. *U. S.*, 208 U. S. 161 (1908), where the Act was considered indivisible.

[3] *Consolidated Gas Co.* v. *City of N. Y.*, 157 Fed. 849, at p. 873.

[4] "The Elements of Jurisprudence," by T. E. Holland, 9th ed., p. 200 (1900).

[5] *People* v. *O'Brien*, 111 N. Y., 1, at p. 40 (1888).

[6] *Water Dist.* v. *Water Co.*, 99 Maine, 377 (1905); *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, at p. 337 (1892).

value if the word value is used to signify the advantage derived from their possession, or, in other words, their utility." [7] The fallacy of considering franchises property was said by the lower court to be caused by "a failure to distinguish between productive and non-productive property. Land * * * may by industry and intelligence be made productive without a franchise; but no excellence in these desirable qualities can ultimately render a franchise productive without the use of money, chattels, and land in conjunction therewith;" and when joined, the franchise contributes nothing since "it has but authorized their [land, chattels, etc.] employment in a particular way and protected the owners while so employing them." Granted that it is non-productive, nevertheless it is property, and the law does protect non-productive property; such as, for instance, a trade-mark.

Considering the franchise as property, the economic question whether a return should be allowed upon it, remains. At this point the question whether the franchise was paid for or not, which was immaterial in considering whether it was property, becomes material. "Return can be expected only from investment and he that invests must part with something in the act of investing." [8] So where the franchise has cost nothing, no return should be allowed on it,[9] even though a different result should be arrived at where the corporation has paid for it. A suggestion in a recent case is that though the right to do the work which the corporation is allowed to do is a property right, which belongs to the state; the state puts this in the business and the company puts in its corporeal property and should get a return only on its corporeal property. The objection made to this is that the state has given over its right and does not retain it, and to say that it does is a mere fiction.[10]

The lower court had found that the value of the franchise had increased proportionately with the increase in the value of the other property; but the Supreme Court held that the value of the franchises is to be taken as of the time when they were transferred to the combined company, and cannot be considered as having advanced in value with a corresponding advance in the general business; because in view, among other things,

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[7] A Treatise on "The Law of Private Corporations," by V. Morawetz, 2nd ed., sec. 929.

[8] *Consol. Gas Co.* v. *City of N. Y., supra,* at p. 873.

[9] "Law of Railroad Rate Regulation," by Beale & Wyman, sec. 362 (1906).

[10] *Water Dist.* v. *Water Co., supra.*

of the recent legislation looking toward a lessening of the huge dividends given by the company, it cannot be said with certainty that the value of the franchise did increase.

The Burden of Proof in Self-Defence.

In the recent case of *Commonwealth* v. *Palmer*,[1] the Supreme Court of Pennsylvania reaffirmed the doctrine, that "if the evidence clearly establishes the killing by the prisoner purposely, with a deadly weapon, an illegal homicide of some kind is established and the burden then falls upon the prisoner, and not on the commonwealth, to show that it was excusable as an act of self-defence." This doctrine has been consistently followed in this state since enunciated by Agnew, J.,[2] and obtains in many other jurisdictions.[3] It must be admitted that the courts of this state are consistent in placing upon the accused the burden of proving by a fair preponderance of evidence that he did not act maliciously or wilfully as in insanity,[4] drunkenness [5] or self-defence,[6] so as to overcome the presumption of intent employed to establish a *prima facie* case.

It is admitted by all that the act and the intent are essential elements of the crime—and that these elements must concur. Malice aforethought or premeditation and deliberation are necessary for murder in the first degree.[7] The prosecution must prove these elements beyond a reasonable doubt before the accused can be convicted.[8] Because of the difficulty of proving the mind of man, a presumption has been raised [9] to assist the prosecution. This presumption has been declared one of law and not of fact. By means of this presumption, the presumption of innocence is overthrown.

Thayer,[10] Wigmore,[11] Cooley,[12] Mr. Justice Harlan,[13] Mr.

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[1] 222 Pa. 299.
[2] 58 Pa. 9 (1868); *Ortwein* v. *Com.*, 76 Pa. 414 (1847).
[3] M'Naghtin's Case, 2 Cl. and F. 199 (1843).
[4] *Com.* v. *Drum*, 58 Pa. 9.
[5] *Com.* v. *Honeyman*, Add. 147 (1793).
[6] *Com.* v. *Crouse*, 4 Clark, 298 (1846).
[7] *Com.* v. *Hagerty*, Lewis' Abridgment, 402 (1847).
[8] Lewis' "Abridgment of Criminal Law," 397.
[9] *O'Mara* v. *Com.*, 75 Pa. 425.
[10] Thayer on Evidence, 380, 381, 382.
[11] Wigmore on Evidence, sec. 2501.
[12] *People* v. *Garbutt*, 17 Mich. 9.
[13] *Davis* v. *U. S.*, 160 U. S. 469.